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No. 06-828

IN THE SUPREME COURT OF THE UNITED STATES

CATHY LYNN HENDERSON,
Petitioner,

v.

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

On Petition for Writ of Certiorari
to the Fifth Circuit Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a Petitioner raising Sixth Amendment claims:

   A. regarding state law enforcement conduct can expressly waive review of the lower court's primary holding that the issue is unexhausted and procedurally defaulted, yet then seek a merits review of the same facts by transforming them into new, and defaulted, Fifth Amendment allegations instead?

   B. regarding pre-trial counsel's allegedly ineffective assistance is entitled to an exception to the offense-specific rule clarified in *Texas v. Cobb*, 532 U.S. 162 (2001)?

2. Whether a Petitioner seeking certiorari review of the Fifth Circuit's affirmance of the district court's denial of habeas relief is ever entitled to review of claims never raised in federal habeas, and only impliedly raised in state court?

3. Whether a Petitioner whose Sixth Amendment ineffective assistance of appellate counsel claim was denied for lack of prejudice is entitled to certiorari review?

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner Cathy Lynn Henderson[1] is scheduled to be executed in the State of Texas **after 6:00 p.m. C.S.T. on Wednesday, April 18, 2007**, for the capital crime of murdering Brandon Baugh, a three-and-a-half-month-old infant left in her care. Henderson has unsuccessfully contested her presumptively valid conviction and sentence in the state and federal courts, arguing inter alia that she was denied her Sixth Amendment rights because law enforcement officials engaged in conduct that compromised the confidentiality of her communications with her lawyers; because the attorneys who represented her on kidnapping charges rendered ineffective assistance for failing to protect the confidentiality of a map she drew to Brandon's body; and because appellate counsel failed to ensure that a transcript of an *in camera* colloquy was included in the record on appeal. She now petitions this Court for a writ of certiorari, complaining that the Fifth Circuit erred when it upheld the district court's denial of habeas relief.

In the lower courts, Henderson raised unexhausted claims on which relief was procedurally barred, and raised exhausted claims on which she failed to meet 28 U.S.C. § 2254(d)(1)'s requirement that the state court's adjudication be contrary to, or unreasonably apply, this Court's precedent. As a result, the district court correctly denied relief and the Fifth Circuit correctly affirmed on appeal. Here, Henderson fails to show differently and, therefore, the Court should deny certiorari review.

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[1] Respondent Nathaniel Quarterman is referred to herein as "the Director."

STATEMENT OF THE CASE

I. Facts of the Crime, Events Surrounding Henderson's Arrest, and the Recovery of Baby Brandon's Body

The Texas Court of Criminal Appeals set forth the following account of the facts:

> On the morning of January 21, 1994, Eryn and Melissa Baugh left their infant son, Brandon, with their babysitter, [Henderson]. That day, both [Henderson] and Brandon disappeared. [Henderson] was profiled on the television show "America's Most Wanted," and Texas law enforcement authorities and the FBI received tips indicating that [Henderson] had been seen with the baby in Missouri and Idaho. In addition, law enforcement obtained information from [Henderson's] daughter that the trunk of [Henderson's] car had been slightly ajar during a trip on the 21st to Holland, Texas and that [Henderson] had carried a diaper bag in her car.
>
> On February 1, [Henderson] was arrested by the FBI in Kansas City, Missouri. FBI agent Michael Napier interrogated [Henderson], while FBI agent Timothy Hepperman observed from behind a one-way mirror. [Henderson] first denied any knowledge of Brandon's location or well-being. Later, she stated that the baby's grandmother, driving a car with Oklahoma license plates, picked up Brandon during the afternoon of January 21. [Henderson] later admitted to killing Brandon but claimed that his death was an accident. She told

Agent Napier that she had buried the baby in a wooded area near Waco, that she had used a spade to dig the grave and had left the spade lying nearby, and that she could take an officer to the scene. Napier memorialized [Henderson's] final story in writing, but she refused to sign the written statement. Agent Napier then turned to the subject of drawing a map, and asked [Henderson] a number of times if she would draw a map of the baby's location. She repeatedly declined to do so and subsequently requested an attorney. The interrogation was then terminated. At the conclusion of the interview, Agents Napier and Hepperman both formed the subjective belief that the baby was dead. On February 2, 1994, Agent Hepperman communicated to Travis County deputies Stan Hibbs and Rick Wines that he believed the baby was dead and also that [Henderson] had declined requests to draw a map.

That same day, Ronald Hall, assistant federal public defender in Kansas City, and Ronald Ninemire, chief investigator for the public defender's office, met with [Henderson]. During the course of conversations with [Henderson], Hall determined that he needed a map. He contacted Agent Hepperman and inquired about obtaining a Texas map. Not knowing who Hall was, Hepperman was uncooperative. In response, Hall told Hepperman that he was trying to locate the baby. Frustrated in his attempts to obtain a map in the federal courthouse, Hall walked across the street to his office and obtained a map from Ninemire's desk. Later, Hepperman arranged delivery of a

Texas map to Hall and apologized for the earlier encounter.

After interviewing [Henderson], Hall talked to a group of law enforcement agents, including Carla Oppenheimer (the assistant U.S. Attorney handling the case), Agent Hepperman, and Deputies Hibbs and Wines. Hall told this group that he believed the baby was dead and buried in a wooded area outside Waco. Several of the law enforcement agents testified that Hall also stated that [Henderson] had drawn a detailed map of the location of the baby and that he (Hall) had never been to Texas but could find the baby with the map. Hall denied making these statements regarding the map and denied that he ever volunteered that [Henderson] had made a map. Instead, Hall testified that he was asked about a map and that he simply stated that all materials were being forwarded to [Henderson's] attorneys in Texas. The testimony is uncontroverted, however, that Hibbs asked both Hall and Ninemire for copies of the map, and both declined such requests.[2] Hepperman and Oppenheimer nevertheless formed subjective beliefs that the map was made with an intent to be turned over to law enforcement. Hepperman based his belief on statements made by Hall to him in attempting to obtain a Texas map while Oppenheimer based her belief on statements made by [Henderson] during the FBI interrogation.

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[2] Hibbs admitted that he asked Hall if he could accidentally leave a copy of the map on the fax machine.

That day, law enforcement authorities asked Nona Byington, [Henderson's] Texas lawyer, for the map, and she attempted to negotiate a plea bargain in which she would exchange the maps in her possession for an agreed sentence. On February 3, a Travis County grand jury issued a subpoena duces tecum for Byington to appear and produce any maps in her possession that were created by [Henderson]. Byington did not appear before the grand jury. Travis County Sheriff Terry Keel subsequently obtained an arrest warrant for Byington and a search warrant for her car and office. On February 4, the arrest warrant was withdrawn but the search warrant for Byington's office and car was executed. No maps were found in the search. During this period of time, Byington was herself represented by attorneys who claimed that the maps were covered by the attorney client privilege. In addition, [Henderson] herself signed an affidavit [on February 7] stating that all communications or materials conveyed by her to her attorneys during the course of representation were privileged and not to be disclosed.

Meanwhile, on February 2, [Henderson] had been transferred from Missouri to Texas custody. While confined in Texas, [Henderson] made various statements concerning Brandon's whereabouts. At one point, she denied any knowledge of the child's location and stated that he had gone with his grandmother. At another point, [Henderson] stated that she could draw a map to a drop-off point in Missouri where the baby had been taken to Oklahoma.

> On February 7, the grand jury issued another subpoena and the State filed a motion to compel production, in compliance with that subpoena, of any maps drawn by [Henderson] in Byington's possession. A hearing was held before Judge Jon Wisser [on February 7] in which the State contended that (1) the maps were not confidential communications covered by the attorney-client privilege, and (2) the maps fell within the crime-fraud exception to the privilege. [On February 8,] Judge Wisser granted the motion to compel. He found that, although an attorney-client relationship between Byington a nd [Henderson] existed, the maps were not privileged because they were made with the intent to be turned over to law enforcement authorities. Judge Wisser explained that, in arriving at his conclusion, he consulted "one of my much more learned brethren of the law school," whom the parties later learned was Professor Guy Wellborn, an expert on the rules of evidence.
>
> As a result of Judge Wisser's ruling, copies of the two maps were turned over pursuant to the grand jury subpoena. According to Hibbs, the maps in fact indicated a grave site. Using the maps, law enforcement authorities found the baby's grave site and recovered his body.

Henderson v. State, 962 S.W.2d 544, 548-550 (Tex. Crim. App. 1997).

II. Procedural History and Facts Relevant to Henderson's First Two Claims for Review

On January 23, 1994, the State of Texas issued a criminal complaint, probable cause affidavit, and warrant for Henderson's arrest for kidnapping. 14 SR at State's Pre-Trial Ex. 14.[3] Two days later, the federal district court in Austin issued a criminal complaint against Henderson for kidnapping. *Id.* at State's Pre-Trial Ex. 1. Following her arrest in Missouri, Henderson was returned to Texas on February 2, 1994. Tr 770 (Finding of Fact ["FF"] 9).[4] On February 3rd, Nona Byington was served with a subpoena duces tecum by a Travis County grand jury to appear and produce any maps in her possession that Henderson had created. *Id.* (FF 12). When Byington failed to appe ar, the State moved to compel production of the maps, and a hearing was held on the motion on February 7th. 14 SR at State's Pre-Trial Ex. 11. On February 8th, the trial court ordered production of the maps. Tr 772-773 (Conclusion of Law ["CL'"] 3); 14 SR at State's Pre-Trial Ex. 12. On February 8th, authorities located a grave site containing Brandon's dead body. 13 SR 1182-1184.

On February 9, 1994, the State of Texas initiated formal adversarial proceedings against Henderson for capital murder by issuing an affidavit for warrant of arrest and detention, and by filing a formal criminal complaint. Tr 6-12. Henderson was indicted on April 22, 1994, and charged with murdering an individual under six years of age -- a capital offense in Texas. *Id.* at 4; TEX. PENAL

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[3] "SR" refers to the transcription of the state court capital murder trial and punishment proceedings, preceded by volume number and followed by page reference.

[4] "Tr" refers to the transcript of pleadings and documents filed with the clerk during the state court trial, followed by page number.

CODE ANN. § 19.03(a)(8) (Vernon's 1994); *App.* 129a-130a.[5] The indictment alleged Henderson killed Brandon Baugh "by striking his head against a blunt object unknown to the Grand Jury and by a manner and means unknown to the Grand Jury." Tr 4.

Henderson pleaded not guilty, and the case proceeded to trial in April 1995. Tr 749. A jury found Henderson guilty of capital murder[6] and, at the close of punishment evidence, found that Henderson presented a future threat to society and that insufficient mitigating evidence existed to warrant a sentence of less than death. *Id.* at 722, 738.[7] In accordance with Texas law, on May 30, 1995,

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[5] "*App.*" refers to Henderson's Appendix, followed by page reference.

[6] During guilt/innocence, three forensic pathologists (two for the State and one for the defense) unanimously concluded that the injuries to Brandon's head could not have resulted from an accidental fall, 33 SR 896; 34 SR 987, but could only have resulted from the infant being slammed with extreme force against a blunt surface such as a countertop or floor. 33 SR 867, 891. The injuries were comparable to those that might result from a fall of greater than two stories. *Id.* at 867. Defense expert Dr. Kris Sperry, however, opined that Brandon's injuries were consistent with a single, impulsive (and, therefore, possibly unintentional) act. 34 SR 987, 993-94.

[7] During punishment, the State established that Henderson assaulted her daughter Melissa verbally and physically, neglected her, and left her for days or weeks at a time at a day care center. Henderson's parental rights were terminated, and Melissa was adopted by her daycare provider. 36 SR 49-57, 60, 80-81, 89, 115-117; 37 SR 373; 38 SR 510, 514, 519-23. The State's evidence also described how Henderson assaulted her five-year-old niece and a coworker, regularly engaged in illegal drug use and occasionally in drug trafficking, and had a criminal history of public intoxication, giving false information to a peace officer, possession of a controlled substance, shoplifting (which occurred in the presence of her daughter), assaulting her husband (after which he applied for a protective order to protect their daughter, Jennifer), and driving while intoxicated. *E.g.*, 36 SR 19-23, 90, 103-05, 174-178, 185-89; 37 SR 328, 340, 362-63, 370.

trial judge Jon Wisser sentenced Henderson to death.

On direct appeal, the Texas Court of Criminal Appeals denied relief on seventeen grounds, affirmed Henderson's conviction and sentence, and later denied rehearing. *Henderson v. State*, 962 S.W.2d 544 (Tex. Crim. App. 1997). Henderson moved for leave to withdraw the mandate, asking the Texas court to consider the transcript of an *in camera* colloquy that had not been included in the appellate record, but her request was denied. *Id.*, 977 S.W.2d 605 (1998). This Court denied certiorari review. *Henderson v. Texas*, 525 U.S. 978 (1998).

Henderson sought state habeas corpus relief on eighteen claims. Judge Wisser entered findings of fact and conclusions of law recommending that relief be denied. *Ex parte Henderson*, No. 49,984-01 (Tex. Crim. App.) at Supp. Trans. of Aug. 2001 at 1-12. The Court of Criminal Appeals adopted the same and denied relief. *Id.* at unpublished order of March 6, 2002.

Henderson filed a preliminary, or skeletal, federal habeas petition in February 2003, and then amended her petition the following month raising a total of thirteen claims, and providing two volumes of exhibits. 1 ROA 21-45, 47-76.[8] Aside from supplementing her amended writ to include a signed affirmation page from her attorney, *id.* at 78, Henderson never supplemented or amended her writ again. In March 2004, the federal district court below granted summary judgment and denied each claim. *App.* 1a-24a. Henderson moved to alter or amend the judgment, which was denied. 2 ROA 359-365; *App.* 109a-116a. However, the court granted a certificate of appealability ("COA") on seven issues, all of which were based solely on the Sixth Amendment. *App.* 118a-

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[8] "ROA" stands for the federal habeas record on appeal in the Fifth Circuit, preceded by volume and followed by page reference.

120a, 124a. In granting a COA, the district court found jurists might disagree with the court's resolution "of her Sixth Amendment claims under the rule announced in *Texas v. Cobb* [, 532 U.S. 162 (2001)], and that reasonable jurists might resolve her ineffective assistance of appellate counsel claim differently." *App.* 124a.

Henderson applied for a COA from the Fifth Circuit on four additional claims,[9] but the court denied her request. *App.* 25a-55a.[10] Following briefing and oral argument on the seven issues certified by the district court, the Fifth Circuit affirmed the denial of habeas relief. *Henderson v. Quarterman*, 460 F.3d 654 (5th Cir. 11 Aug. 2006); *App.* 1a-24a. The court also denied rehearing. *App.* 125a-126a. Henderson petitioned for certiorari review of the Fifth Circuit's latter decision, and this opposition followed.

III. Facts Relevant To Henderson's Third Claim

During the February 7, 1994 grand jury subpoena hearing on the State's motion to compel disclosure of the maps, an *in camera* colloquy occurred between Judge Wisser and Henderson's attorney Nona Byington, wherein Judge Wisser expressed his belief that the child was dead. Henderson's Fed. Writ Ex. PP at 76.[11] The

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[9] One COA claim asserted that the Fifth and Fourteenth Amendments were violated because her statement to the FBI was involuntary and coerced. Application for [COA] at 31-34. This was the only Fifth Amendment claim raised in Henderson's amended writ. *Compare id. with* 1 ROA 55-72.

[10] Henderson states that she "does not seek review of the court of appeals' denial of a [COA]." Petition at 1 n.1.

[11] Henderson characterizes this as a "lower court finding." Petition at 3. Judge Wisser never issued any finding regarding his personal belief. 3 Tr 768-773 ("Findings of Fact and Conclusions of Law on Defendant's Motion(s) to Suppress Due to Violation of Attorney-Client Privilege").

following day, Judge Wisser granted the State's motion and ordered disclosure of the maps. 14 SR at State's Pre-Trial Ex. 12. The record provided to the Court of Criminal Appeals did not include a transcript of the *in camera* colloquy. During state habeas corpus proceedings, Henderson's appellate attorney Keith Hampton stated in aa affidavit that he did not know about the *in camera* proceeding and, thus, did not raise it on direct appeal. *Ex parte Henderson*, No. 49,984-01 at Supp. Trans. of January 3, 2000 at 143.

SUMMARY OF ARGUMENT

On federal habeas review, Henderson alleged that she was denied her Sixth Amendment rights by the actions of state law enforcement and by the ineffective assistance of counsel prior to trial and on direct appeal. 1 ROA 47-76. But her claim regarding law enforcement is unexhausted and procedurally defaulted. Yet even if the allegations are considered, Henderson cannot establish a Sixth Amendment violation. Under *Texas v. Cobb*, *supra*, Henderson's Sixth Amendment right to counsel had attached on state and federal kidnapping charges by the time the trial court ordered production of the maps, but those same rights had not yet attached on the uncharged offense of capital child-murder. As a result, the Sixth Amendment was not violated by the acts of law enforcement or by the conduct of pre-trial attorneys Ron Hall, Nona Byington, Steve Brittain, and Linda Icenhauer-Ramirez -- each of whom played some role in protecting the confidentiality of the map.

Henderson further attempts to transform her existing Sixth Amendment claims into Fifth Amendment issues; however, new claims cannot be raised for the first time on appeal. And while Henderson seeks certiorari review of "important" constitutional issues "implicit" to the Texas court's direct appeal opinion, these issues were never raised on federal habeas.

Finally, while Henderson argues that she was denied constitutionally effective assistance on direct appeal because her attorney failed to ensure that a transcript of an *in camera* colloquy was included in the appellate record, habeas relief was correctly denied because, assuming *arguendo* counsel performed deficiently, Henderson failed to prove how the omission prejudiced her appeal.

ARGUMENT

Review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." SUP. CT. R. 10 (West 2004). Henderson advances no compelling reason in this case, and none exists. Indeed, the issues involve only the application of well-established habeas law and constitutional principles to the facts. Thus, the petition presents no important questions of law to justify the Court's exercise of its certiorari jurisdiction.

Additionally, because Henderson's § 2254 petition was filed after the effective date of the AEDPA, the petition is subject to a heightened standard of review. *Penry v. Johnson*, 532 U.S. 782, 792 (2001). Under the AEDPA, habeas relief is precluded for claims adjudicated on the merits in state court unless that adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

28 U.S.C. § 2254(d).

I. The Courts Below Correctly Denied Relief on Henderson's Sixth Amendment Law Enforcement and Pre-trial Ineffective Assistance Claims.

As her first issue for granting review, Henderson argues that *Texas v. Cobb* does not support the decisions below and should not be extended to her case. Petition at 14-23. She insists the courts utilized *Cobb* to "fence-off merits review" of her "underlying constitutional claims that the State violated her right to remain silent and her right to counsel by forcing her attorney to betray her confidences, and that the assistance of her trial attorneys in attempting to do so was constitutionally ineffective." *Id.* at 14, 15. Yet Henderson never raised any such Fifth Amendment claim on federal habeas and cannot do so now on appeal. The Sixth Amendment claim she did raise concerning state law enforcement is unexhausted and defaulted, and she now expressly waives review of that procedural ruling. Most importantly, her waiver results in the Court no longer having any properly-raised claim before it which alleges improper state action. In any event, Henderson's Sixth Amendment law enforcement claim, as well as her pre-trial ineffective assistance claims regarding disclosure of the maps, are meritless based on this Court's precedent as clarified in *Cobb*.

A. Henderson's Fifth Amendment allegations are improperly before the Court.

Henderson argues the State employed tactics which made an end-run around the protections secured by *Miranda v. Arizona*, 384 U.S. 436 (1966), and which were more egregious than the conduct disapproved of in *Missouri v. Siebert*, 542 U.S. 600 (2004). Petition at 14. She insists the courts below avoided merits review by applying *Cobb* and then either ignoring, or mischaracterizing, her *Miranda* and Fifth Amendment claims. *E.g., id.* at 12 (issues "said to implicate *Texas v. Cobb*"), 14 ("fenced-off merits review"),

18-19 ("ignored" *Miranda* "altogether in the teeth of *Cobb's ratio decidendi*"), 20 ("portray[ed]" her right to counsel "as one arising *only* under the sixth amendment, and not equally under the fifth, per *Miranda*") (original emphasis).

The federal habeas record belies this claim. Henderson asserted only one Fifth Amendment claim in her amended writ petition -- that her statements to FBI Agent Napier were involuntary and coerced. *Compare* 1 ROA 72 *with id.* at 55-72; *see also App.* 65a-67a (list of all thirteen claims on which Henderson sought habeas relief); *App.* 118a-120a (list of all thirteen claims on which she sought COA). The district court never applied *Cobb* to the claim, nor should it have, since *Cobb* is a Sixth Amendment case. Henderson's Fifth Amendment claim was addressed, and denied, on the merits, *App.* 105a-108a, and, in turn, a COA was denied. *App.* 117a-124a; *App.* 35a-37a. If the district court "ignored" *Miranda* and the Fifth Amendment (aside from the claim regarding Napier), any omission occurred because Henderson never raised the allegations in her amended petition.[12]

Furthermore, in this Court, Henderson expressly waives review of her lone Fifth Amendment issue. Petition at 1 n. 1 (not seeking review of any claim on which a COA was denied); *id.* at 20 (stating that she seeks "no relief" based upon timing or content of *Miranda* admonition from Agent Napier, or based on what she

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[12] Henderson attempted to interject the Fifth Amendment into appellate proceedings by arguing that she "complained under the Sixth, Fifth, and Fourteenth Amendments about the actions of her attorneys. . . ." Appellant's Brief in *Henderson v. Quarterman*, No. 04-70032 at 19. Although she raised these allegations in her state writ and in her skeletal federal writ, she only raised a Sixth Amendment challenge in her amended federal petition. *Compare Ex parte Henderson*, No. 49,984-01 at State Writ at 70-114 & 1 ROA 27-32 *with* 1 ROA 55-59. She also asserted the Fifth Amendment as grounds for granting rehearing *en banc*, but rehearing was denied. *App.* 125a-126a.

admitted to Napier prior to invoking *Miranda* rights). And now, in stark contrast to her amended writ, Henderson wholeheartedly endorses that Napier thoroughly advised her of her *Miranda* rights and that she knew the consequences of making a statement. *E.g.*, *id.* at 20-21 ("correctly advised" of her rights, "[w]ords of broader dimension would be difficult to imagine," and she "therefore *knew* that if she answered any questions about the infant's death, she did so at her own peril.") (original emphasis).

Throughout her Petition, Henderson argues that the State violated her *Miranda*-protected rights in compelling disclosure of the maps; however, the Court should refuse her attempts to transform her existing Sixth Amendment claims into new, and heretofore defaulted, Fifth Amendment allegations. Indeed, this Court has long held that it will neither decide issues raised for the first time on petition for certiorari nor decide federal questions not raised and decided in the court below absent exceptional circumstances. *See, e.g., Adams v. Robertson*, 520 U.S. 83, 86 (1997) (*per curiam*) (citing *Heath v. Alabama*, 474 U.S. 82, 87 (1985), *Illinois v. Gates*, 462 U.S. 213, 218-222 (1983), and *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940)). Since Henderson's Fifth Amendment allegations are improperly before the Court, they should form no basis for certiorari review.

B. Henderson waives review of her unexhausted and procedurally defaulted Sixth Amendment law enforcement claim.

The only claim challenging law enforcement conduct which is arguably before the Court is Henderson's Sixth Amendment claim; however, she expressly waives review of this issue.

In her amended writ, Henderson argued that law enforcement officials engaged in conduct that compromised the confidentiality of her communications with her lawyers and violated the Sixth Amendment. 1 ROA 55-57. Specifically, she alleged that law enforcement unconstitutionally interfered with her Sixth Amendment right to effective assistance of counsel by repeatedly claiming that Brandon was alive despite information to the contrary, and that they did so in an effort to get around the attorney-client privilege that protected Henderson's maps from discovery. She also alleged that the trial judge's order to produce the maps violated the Sixth Amendment by "piercing the privilege. . . ." *Id.* at 57.

The federal habeas court found that Henderson never argued in state court that law enforcement conduct or Judge Wisser's ruling violated the Sixth Amendment[13] and, therefore, the claim was unexhausted. *App.* 71a-72a.(citing 28 U.S.C. § 2254(b); *Castille v. Peoples,* 489 U.S. 346, 349 (1989); *Picard v. Connor,* 404 U.S. 270, 275-276 (1971); *Rose v. Lundy,* 455 U.S. 509, 518 (1982); and *Baldwin v. Reese,* 541 U.S. 27, 33-34 (2004)). During oral argument at the Fifth Circuit, Henderson's appointed counsel conceded this very point. *App.* 11a.

Because Henderson failed to exhaust her state remedies and because the Texas courts would refuse to consider the merits in a successive habeas application, the district court found the Sixth Amendment law enforcement issue procedurally defaulted. *App.* 72a-73a (citing *Coleman v. Thompson,* 501 U.S. 722, 729 (1991)); *see* TEX. CODE CRIM. PROC. ANN. art. 11.071 § 5(a) (Vernon's

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[13] On direct appeal, Henderson challenged the trial court's order compelling production, but simply asserted that the ruling improperly infringed the attorney-client privilege. *See* Brief of Appellant in *Henderson v. State,* No. 72,157, at 58-85. She drew no necessary connection between a violation of the attorney-client privilege and the Sixth Amendment.

Supp. 1995) (barring successive state habeas applications absent a showing of cause or actual innocence). Henderson showed neither cause and prejudice, nor miscarriage of justice, as might serve to excuse her procedural default. *App.* 73a (citing *Bousley v. United States*, 523 U.S. 614, 623 (1998), and *Moore v. Roberts*, 83 F.3d 699, 701 (5th Cir. 1996)). On appeal, the Fifth Circuit affirmed the procedural ruling and refused to consider the claim. *App.* 11a.

Henderson dismisses this "exhaustion ruling" as "an alternative ground" for disposing of one of the claims "the district court thought implicated by *Cobb* . . . ." Petition at 3 n.3; *see id.* at 12-13. To the contrary -- the district court's procedural ruling was its *primary* basis for denying relief whereas the merits ruling was only offered alternatively. *App.* 71a-73a. The significance of this procedural bar cannot be understated where, as here, the Fifth Circuit flatly refused to consider the merits of Henderson's unexhausted and defaulted claim. *App.* 11a ("[T]his unexhausted claim cannot be considered."). Incredibly, Henderson states that she does not seek review of the procedural ruling because "if the decision below is reversed, there will be time enough for the district court to reconsider it." Petition at 3 n.3. Assuming *arguendo* this Court holds that *Cobb* does not apply, the lower courts would have no opportunity for "reconsideration" because, as a consequence of Henderson's waiver, her underlying claim would necessarily remain unexhausted and procedurally defaulted.

C. Procedural bar aside, Henderson's Sixth Amendment law enforcement claim, as well as her pre-trial ineffective assistance claims, are meritless based on *Cobb*.

Even if Henderson had not defaulted (and now waived) her law enforcement claim, Henderson had no Sixth Amendment right to counsel on the capital child-murder charge during the relevant

time period in question. And since the allegedly deficient performance of attorneys Ron Hall, Nona Byington, Steve Brittain, or Linda Icenhauer-Ramirez took place, if at all, prior to the attachment of that right, then no valid Sixth Amendment claim can be made. Thus, the district court held that Henderson had no grounds for raising any Sixth Amendment violation. *App.* 70a, 73a-79a (citing, *e.g.*, *Cobb*).[14] In accordance with *Cobb*, the Fifth Circuit affirmed that Henderson's pre-trial ineffective assistance claims were meritless. *App.* 11a, 12a-18a. Certiorari review is unwarranted here.

The Sixth Amendment right to counsel attaches at the initiation of "adversary judicial proceedings." *Michigan v. Jackson*, 475 U.S. 625, 629-30 (1986). The commencement of formal adversarial proceedings can include a formal charge, preliminary hearing, indictment, information, or arraignment. *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991); *United States v. Gouveia*, 467 U.S. 180, 188 (1984); *Kirby v. Illinois*, 406 U.S. 682, 689 (1972). Importantly, this Sixth Amendment right is offense specific. *McNeil*, 501 U.S. at 175. In *Texas v. Cobb*, this Court reaffirmed the rule, holding that even if the right to counsel has attached on one charged offense, it does not attach on uncharged offenses, even if those offenses are factually related or inextricably intertwined with the charged offense. *Cobb*, 532 U.S. at 167-68, 173-74. Rather, where the right has attached for one offense, it attaches only to other offenses not formally charged that "would be considered the same offense under the *Blockburger* test." *Id.* at 173. Under

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[14] The district court reasoned that Ron Hall's and Nona Byington's alleged disclosure that Henderson had drawn a map occurred, if at all, sometime between Henderson's arrest and the February 7, 1994 motion to compel hearing whereas the allegedly ineffective assistance of attorneys Steve Brittain and Linda Icenhauer-Ramirez occurred, if at all, during the same February 7th hearing. *App.* 79a.

Blockburger, two offenses are not the "same offense" if one "requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932).[15]

Henderson was formally charged with kidnapping in late January 1994. 14 SR at State's Pre-Trial Ex. 1 & 14. Therefore, at the time of Judge Wisser's February 8, 1994 ruling compelling production of the maps, Henderson had a Sixth Amendment right to counsel on state and federal charges of kidnapping, which Texas law defined as "intentionally or knowingly abduct[ing] another person." TEX. PENAL CODE ANN. § 20.03(a) (Vernon's 1994); *App.* 131a. However, the State did not initiate formal adversarial proceedings against her for capital child-murder until February 9, 1994. Then, the State issued an arrest warrant and filed a formal criminal complaint against Henderson for capital child-murder for her intentionally or knowingly causing the death of Brandon Baugh, an individual "under six years of age." Tr 6-12; TEX. PENAL CODE ANN. § 19.03(a)(8); *App.* 129a-130. [16]

Under the *Blockburger* test, each offense for which Henderson was charged (kidnapping versus capital child-murder) requires proof of different facts. As the Fifth Circuit explained, the kidnapping charge requires that the child have been taken from his guardian, while the capital child-murder charge requires that the child have been killed. *App.* 16a. As such, Henderson's Sixth

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[15] Federal and state offenses -- even if the elements are identical -- are not the "same offense" for Fifth or Sixth Amendment purposes because the federal and state governments are separate sovereigns. *See Heath v. Alabama*, 474 U.S. at 88-93; *United States v. Avants*, 278 F.3d 510, 517 (5th Cir 2002).

[16] Importantly, Henderson was not tried for kidnapping, nor did the State charge her with capital murder based on murder in the course of a kidnapping under TEX. PENAL CODE ANN. § 19.03(a)(2) (Vernon's 1994). Thus, the kidnapping charges form no basis for her conviction and current incarceration.

Amendment right to counsel did not attach on the capital murder charge until she was formally charged on February 9, 1994. *See Cobb*, 532 U.S. at 173. Most importantly, since the complained-of conduct by law enforcement, by Henderson's attorneys, or even by Judge Wisser's ruling occurred prior to February 9th, Henderson's Sixth Amendment rights were not violated. Indeed, where there is no right to counsel, there can be no right to the effective assistance thereof. *See Wainwright v. Torna*, 455 U.S. 586, 587-88 (1982).

To merit federal habeas relief, Henderson need establish that the state court's adjudication was contrary to, or unreasonably applied, this Court's clearly established precedent. 28 U.S.C. § 2254(d)(1). When faced with her Sixth Amendment claims on state habeas, the convicting court issued findings and conclusions that Henderson's attorneys were not constitutionally ineffective, and the Court of Criminal Appeals adopted the same in denying relief.[17] As *Cobb* makes clear, because Henderson had no Sixth Amendment right to counsel for the capital child-murder charge during the time these four attorneys acted on her behalf on the kidnapping charge, she had no legal grounds for a Sixth Amendment claim. Therefore, the state court's denial of relief was not unreasonable under the AEDPA. Henderson fails to show differently where, as here, she does not even mention the burden imposed upon her by the AEDPA. *See* Petition at 14-23.

D. The Court should reject Henderson's attempts to discount or distinguish *Cobb*.

Initially, Henderson challenges *Cobb* by suggesting that the lower courts used it to avoid a merits review of her constitutional claims. Petition at 12 (court "did not reach merits of petitioner's

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[17] *Ex parte Henderson*, No. 49,984-01 at Supp. Trans. of Aug. 2001 at 1-4; *Id.* at unpublished order of March 6, 2002.

claims"), 14 (courts "used *Cobb* to fence-off merits review"). To the contrary, before reaching the issue of whether Henderson's counsel was ineffective under the Sixth Amendment, the court first had to address whether Henderson even had a Sixth Amendment right to counsel to begin with. The court's holding that she had no such right on capital child-murder charges was, in fact, a merits determination, as opposed to a purely procedural ruling.

Henderson attempts to distinguish *Cobb* are unavailing. First, she argues that her case "does not implicate *Cobb's* concerns about the differences in the waiver standards of *Miranda* and *Jackson*." Petition at 15-20 (citing *Michigan v. Jackson*, *supra*). By Henderson's account, *Cobb* "at bottom" resolved a conflict "between *Miranda's* standard of waiver of the right to counsel during the interrogation of uncharged crimes, and the greater hurdle imposed by *Jackson*, when and if police wish to interrogate a defendant about a crime on which he has already been charged." *Id.* at 15-16. According to Henderson, since no waiver-standard conflict existed in her case, *Cobb* is inapplicable. *Id.* at 18. However, *Cobb* is not a waiver case. Instead, *Cobb* is solely concerned with when the Sixth Amendment right to counsel attaches, and its purpose could not be clearer -- to reaffirm that *McNeil* "meant what it said, and that the Sixth Amendment right is offense specific." *Cobb*, 532 U.S. at 164 (citing *McNeil v. Wisconsin*). *Cobb* also abrogated those state court and federal courts of appeals cases which had read into *McNeil* an exception for crimes that are "factually related" to the charged offense. *Id.* at 168. Although Henderson argues *Cobb* is inapplicable because she had no conflict in waiver standards, *Cobb* offered no such exception to the offense-specific rule originally announced in *McNeil*.

Further, Henderson argues that there is no meaningful distinction between the right to counsel under *Miranda* and the right to counsel under the Sixth Amendment because counsel's office is

at all times to maintain the suspect's right not to incriminate herself. Petition at 19-20 (citing *Patterson v. Illinois*, 487 U.S. 285, 294, n.6 (1988)).[18] Certainly most defendants would want to maintain a confidential relationship with cour el. However, if this was reason enough to allow the Sixth Amendment right to counsel to attach to all uncharged offenses, then the *Cobb* rule would be rendered meaningless for all accused individuals who might potentially face additional yet-to-be-filed charges.

Next, Henderson contends *Cobb* is inapplicable because its Sixth-Amendment-offense-specific rule arose out of concern that "time-shifting the *Jackson* standard" may lead police to refrain from questioning certain defendants altogether. Petition at 20 (citing *Cobb*, 532 U.S. at 173-174). In Henderson's view, her case did not have any "police confusion"about invoking her Fifth Amendment rights -- she was thoroughly advised of her *Miranda* rights, she understood those rights, she voluntarily spoke to Agent Napier, and she then later invoked her *Miranda* rights. *Id.* at 20-21. Yet *Cobb* offered no exception to its offense-specific rule based on an absence of "police confusion," and such an exception would likewise render *Cobb* meaningless.

As her last attempt to justify that *Cobb* should not apply, Henderson argues "*Cobb* does not sanction State invasion of [her] right to counsel simply because the ultimate fruit differed from that asserted to justify the invasion." Petition at 21. Presumably, acts of law enforcement are not justified by the fact that officers hoped to

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[18] She also asserts that *Patterson* "scotches the court of appeals' efforts to portray petitioner's right to counsel as one arising only under the sixth amendment, and not equally under the fifth, per *Miranda*." Petition at 20, 22. Yet as previously explained, the lower courts addressed Henderson's "right to counsel" claims on Sixth Amendment grounds because that was the only legal basis raised on federal habeas. *E.g.*, *App.* 65a-66a, 118a-119a.

find Brandon alive and the victim of kidnapping, but instead found his dead body (the ultimate fruit) and charged Henderson with capital child-murder. *See id.* at 21-23. However, there is no properly raised claim of improper state action currently before this Court. As explained in Part I. A. & B., *supra*, Henderson raised no Fifth Amendment claim on federal habeas (aside from the voluntariness of her statement to Agent Napier), and her Sixth Amendment claim challenging law enforcement conduct and Judge Wisser's ruling to produce the maps is unexhausted and defaulted. Since Henderson expressly waives review of the "exhaustion ruling," Petition at 3 n.3, the Court should not consider the alleged merits of any improper state conduct claim.

Henderson further argues that *Cobb's* offense-specific rule is "harsh" and should not apply because, at the time of the allegedly problematic conduct, she was charged with kidnapping the same child she was eventually charged with murdering and, thus, "there seems significant danger of gamesmanship by authorities." Petition at 21 (citing *App.* 122a). Although the respondent in *Cobb* predicted that an offense-specific rule would prove disastrous because it would "permit law enforcement officers almost complete and total license to conduct unwanted and uncounseled interrogations," this Court rejected the argument because he offered no proof such a "parade of horribles" had occurred in those jurisdictions which followed an offense-specific rule. *Cobb*, 532 U.S. at 171. Henderson does not specifically argue that her case actually presents that "parade of horribles." *See* Petition at 21-23.

Nor could she. As the Fifth Circuit explained, Henderson's factual situation "would *not* fit in such a parade." *App.* 17a (original emphasis). For example, there is no claim that Henderson did not receive her *Miranda* warnings. Indeed, in this Court, she applauds the thoroughness of FBI Agent Napier's warnings prior to taking her statement. *E.g.*, Petition at 20-21. The Fifth Circuit also

found compelling the fact that Henderson's pre-trial motion to suppress the evidence (maps) was heard extensively and denied on the merits.[19] *App.* 18a; *see, e.g.*, 9 SR 574-592, 642-652; 10 SR 777-827; 12 SR 1139-1154; 13 SR 1195-1204; 14 SR 1228-1129. Thus, even if Henderson's attorneys who represented her on kidnapping charges during the February 7th motion to compel hearing somehow failed to advance her interests, Henderson was afforded more than ample opportunity during pre-trial on the capital child-murder charge to represent those interests. And although Henderson asserts that her attorneys were compelled or pressured to surrender the maps, the record reflects that the maps were not actually produced until the trial court ordered production. Additionally, during pre-trial on the capital murder charge, Henderson's trial counsel withdrew the allegation that law enforcement authorities were attempting to violate the attorney-client privilege. *See* note 20, *supra.* Furthermore, because Henderson attempted to create a new-rule exception to *Cobb*, the lower courts reasoned she is arguably barred by *Teague v. Lane*, 489 U.S. 288, 310 (1989). *App.* 78a; *App.* 17a.

Finally, Henderson overlooks the very arguments advanced by this Court for why it was reaffirming the offense-specific rule in *Cobb*:

> First, there can be no doubt that a suspect must be apprised of his rights against compulsory self-

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[19] In August 1994, Henderson filed a "Motion to Suppress Due to Violation of Attorney-Client Privilege" which argued for suppression of "material revealed and recovered as a result of" the compelled release of the maps. 1 Tr 129-132. She also filed, yet later withdrew, an amended motion. 13 SR 1124. Henderson's trial counsel Linda Icenhauer-Ramirez explained that, because of the recent discovery of evidence not previously provided by the State, the defense would go back to its original motion. *Id.* She also informed the court: "Basically what we've deleted is the allegation that law enforcement authorities were attempting to violate the attorney/client privilege." *Id.* at 1126.

> incrimination and to consult with an attorney before authorities may conduct custodial interrogation. *See Miranda v. Arizona*, 384 U.S. at 479 . . .; *Dickerson v. United States*, 530 U.S. 428, 435 ... (2000) (quoting *Miranda*). In the present case, police scrupulously followed *Miranda's* dictates when questioning respondent. Second, it is critical to recognize that the Constitution does not negate society's interest in the ability of police to talk to witnesses and suspects, even those who have been charged with other offenses.

Cobb, 532 U.S. at 171-72 (footnote omitted). As the *Cobb* Court noted, "Even though the Sixth Amendment right to counsel has not attached to uncharged offenses, defendants retain the ability under *Miranda* to refuse any police questioning, and, indeed, charged defendants presumably have met with counsel and have had the opportunity to discuss whether it is advisable to invoke those Fifth Amendment rights." *Id.* at 171, n. 2. Although Henderson would like to portray herself as more or less adrift in the legal system with no one to assist her or protect her rights, she was not without such constitutional protections. The only reason her Fifth Amendment claims were not considered below is the direct consequence of Henderson's own failure to raise the same on federal habeas review.

II. Henderson's Attempt to Resurrect Issues Implicitly Raised on Direct Appeal in State Court but Not in the Federal Courts Below is Improper and Cannot Provide a Basis for Granting Certiorari Review.

In seeking a writ of certiorari, Henderson wants to empower the federal district court to review "constitutional questions" implicitly raised by the Texas Court of Criminal Appeals on direct appeal. Petition at 23-28. For example, she complains that the Texas court erred in denying her claim that her Fifth and Fourteenth

Amendment rights against self-incrimination were violated when attorney Ron Hall disclosed confidential information to authorities, claiming the decision incorrectly interpreted *Fisher v. United States*, 425 U.S. 391 (1976). Petition at 24-25 (citing *Henderson v. State*, 962 S.W.2d at 558-559). She also argues that attorney Nona Byington faced a conflict of interest under *Cuyler v. Sullivan*, 446 U.S. 335 (1980), when she was "put to the choice of going to jail or sacrificing her client's interests." Petition at 27. According to Henderson, this Court "should not preclude district court consideration of these important questions," least of all by "an unprincipled extension" of *Cobb*. *Id.* at 28.

As an initial matter, since Henderson seeks review of the Fifth Circuit's affirmance of the district court's denial of habeas relief, the underlying constitutional claims must necessarily have been raised on federal habeas. *See* 28 U.S.C. § 2254(d) (setting out standard for federal court's review of state court adjudication). Henderson simply ignores the AEDPA and instead, seeks certiorari review as "a gateway" to the district court's "full consideration" of the issues "in the first instance." Petition at 23-24. And in seeking review of "implicit" constitutional issues (as compared to explicitly raised issues), she ignores the AEDPA's requirements for exhaustion. Henderson cites no authority (and indeed there is none) which would ever allow this Court to grant review in such instance.

Henderson sought certiorari review of the Texas court's direct appeal decision and was denied review by this Court in 1998. *Henderson v. Texas*, 525 U.S. 978 (1998). If Henderson wanted to challenge the Texas court's consideration of *Fisher*, she could have done so eight years ago in her initial request for certiorari. Likewise, Henderson's claim al leging conflict of interest was raised, and rejected, on state habeas. *Ex parte Henderson*, No. 49,984-01 at State Writ at 79-80 (citing *Cuyler*). She failed to raise this claim in her amended federal petition, thereby defaulting it

from federal review. Henderson does not contend (nor could she) that the State somehow prevented her from seeking review of these claims in a proper manner. Instead, her request for review of this issue is nothing more than an improper attempt to obtain an entirely new federal habeas proceeding.

III. The Courts Below Correctly Denied Relief on Henderson's Appellate Counsel Ineffective Assistance Claim.

Henderson argues that appellate counsel was ineffective for failing to ensure the record contained a transcript of the *in camera* colloquy between Judge Wisser and attorney Nona Byington (Henderson's Fed Writ Ex. PP at 76). She asserts that she was prejudiced because the Texas court determined issues on appeal relating to her attorney-client privilege without the benefit of Judge Wisser's remark during that colloquy that he thought the baby was dead. 1 ROA 61-62.

A defendant is entitled to constitutionally effective assistance of counsel on appeal where the appeal is a matter of right under state law. *Evitts v. Lucy*, 469 U.S. 387, 395 (1985); *Douglas v. California*, 372 U.S. 353, 355 (1963). The performance of appellate counsel is assessed under *Strickland v. Washington*, 466 U.S. 668, 687 (1984), whereby Henderson must show professionally unreasonable performance that actually prejudiced her case. Even if counsel's representation was deficient, Henderson must affirmatively prove prejudice that is "so serious as to deprive [him] of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687; *see also Hill v. Lockhart*, 474 U.S. 52, 57 (1986) (defendant must affirmatively prove, not merely allege, prejudice). To this end, in state court, Henderson needed to show a reasonable probability that, but for counsel's deficiencies, the result of the proceeding would have been different; a "reasonable probability"

is one sufficient to undermine confidence in the outcome. *Strickland,* 466 U.S. at 694. The state habeas court rejected this claim, finding that Hampton did not render deficient or prejudicial performance.[20] The federal district court below denied relief because, assuming deficiency, Henderson could not show how the omission prejudiced her appeal. *App.* 90a-92a. The Fifth Circuit correctly affirmed. *App.* 19a-24a.

Although the *in camera* transcript shows that Judge Wisser had a personal belief that Brandon was dead, the primary basis for his ultimate ruling that Byington produce the maps was that the maps were not confidential communications made for the purpose of obtaining or facilitating professional legal services. 3 Tr 772. On appeal, the Texas court assumed, without deciding, that the maps were confidential and proceeded to determine that public policy interests in finding Brandon outweighed the privilege because *law enforcement authorities* had reason to believe that Brandon could still be alive:

> [T]he attorney-client privilege was legitimately required to yield to the strong public policy interest of protecting a child from death or serious bodily injury. At the time the trial court compelled production of the maps, *authorities* had reason to believe that the baby might still be alive. [Henderson] had initially given conflicting stories to the FBI, and at least one of those stories indicated that Brandon was still alive. While [Henderson] later claimed that the baby was dead, *law enforcement officials* were not bound to take her word for the matter. Further, she later told another

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[20] *Ex parte Henderson*, No. 49,984-01 at Supp. Trans. of Aug. 15, 2001 at 5; *Id.* at unpublished order of March 6, 2002 (adopting habeas court's findings and conclusions, and denying relief).

> inmate in Texas that the baby had been dropped off alive in Missouri to be taken to Oklahoma. Although the maps indicated a grave site and were consistent with [Henderson's] claim that the baby was dead and buried near Waco, *law enforcement officials* were entitled to believe that [Henderson] could be telling half-truths and that the maps might lead to a live baby. Even if *authorities* believed that the chance of the maps leading to a live baby was remote, they were entitled to pursue that remote possibility.[] If the child had been abandoned, or secreted with an accomplice of [Henderson's], his life or health might have been in jeopardy. Hence, *authorities* could obtain the maps in an attempt to terminate a kidnapping.[]

Henderson, 962 S.W.2d at 557 (emphasis added). The Texas court was clearly concerned with the beliefs of law enforcement officials in determining whether public policy interests in disclosure outweighed the privilege. *Id.* Under these circumstances, then, the rationale underlying its conclusion is not undermined merely by Judge Wisser's expression of his personal belief. Therefore, assuming counsel performed deficiently for failing to include the transcript, federal relief was denied because, given the Texas court's focus "on the mind-set of the authorities, as opposed to the belief of the judge," Henderson could not demonstrate how the omission prejudiced her on appeal. *App.* 92a. Furthermore, Henderson failed to meet the burden under the AEDPA of demonstrating in the courts below that the state court's denial of her claim was contrary to, or an unreasonable application of, *Strickland. App.* 20a (discussing limited role of appellate court in reviewing state court's decision under AEDPA).

To this Court, Henderson complains that the "sincerity of law enforcement" is an inappropriate basis for breaching attorney-client communications, and that Judge Wisser's belief that the baby was dead should have been controlling. Petition at 28-30. Yet even if the Texas court had reviewed the *in camera* colloquy, and even if it would have determined afterward that the public policy reasons justifying disclosure were not applicable, the court could simply have agreed with Judge Wisser's conclusion that the maps were not confidential communications made for the purpose of facilitating professional legal services. Consequently, Henderson does not demonstrate a reasonable *probability* that inclusion of the *in camera* proceedings would have changed the outcome on direct appeal, or that the result of the appeal was rendered unfair in the transcript's absence. Indeed, it is not enough that Henderson merely show that counsel's action had "some conceivable effect" on the outcome of the proceeding. *See Strickland,* 466 U.S. at 693.

CONCLUSION

The Court should deny certiorari review.

Dated: January 23, 2007

Respectfully submitted,

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